IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NO. 52 OF 2003

BETWEEN:

LIQUIDATOR, IMPORT & EXPORT (MW) LIMITED…….APPELLANT

-and-

J.L.KANKWANGWA AND OTHERS.....….....DEFENDANT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Messrs Makhambera andNjobvu of Counsel for the Appellant

Mr Kankwasi of Counsel for the Respondent

Mr Rhodani, Official Interpreter/ Recording Officer

Dates of hearing : 17th , 18th and 19th September 2003

Date of judgment: 22nd December 2003

Editorial Note

This is an appeal against the decision of the Industrial Relations Court Chairperson. In this regard, this court has been called upon to determine the following issues arising in this appeal:

1. Whether, as a requirement of fair practices under Section 31 of the Republic of Malawi Constitution, the respondent, are entitled to be repatriated to their home districts regardless of the circumstances and/or place of recruitment.

2. Whether the court in quo had jurisdiction to award interest on any of the sums payable to the respondents following the termination of their employment with Import and Expert (MW) Ltd (now in liquidation).

3. Whether, if the respondents were entitled to interest, same was payable in the

circumstances of this case.

4. Whether the Order that the appellant should pay legal practitioners collections charges was properly made in the circumstances.

JUDGMENT

Kapanda, J:

Introduction

This is an appeal against the judgment of the Chairman of the Industrial Relation Court. [1] The appellant is the liquidator of Import and Export (Malawi) Limited. The respondents are former employees of Import and Export (Malawi) Limited[2] (the company). Their employment was terminated following the winding up of the said Import and Export (Malawi) Limited.

Factual Background

For an appreciation of the matters in issue in this appeal there is need to set out some factual background on how the matter came to engage the attention of the Industrial Relations Court. As far as practicable, the court will set out the relevant factual background in a chronological order.

Appointment of Receiver and Manager

The most relevant event that eventually led to the fall out between the appellant and the respondents begun on 29th April 2002. On this day the Commercial Bank of Malawi appointed a Mr Ray Davies to be a Receiver and Manager of Import and Export (Malawi) Limited. The appointment was in pursuance of the terms and conditions of various debentures issued by the company in favour of the said Commercial Bank of Malawi.

Termination of Employment

The Receiver and Manager then proceeded to terminate all contract of employments that the company had with the respondents. In his letter of 13th May 2002[3] the Receiver and Manager informed the respondents that the termination of their employment with the company was going to be effective 15th May 2002. He further advised them of the terminal benefits that they were going to get. Three days later, ie. On 16th May 2002, there was another letter[4] to the employees advising them of further benefits that were due to them. The additional benefits included, inter alia, severance payment and provision of transport to those requiring repatriation. As regards severance allowance, the respondents were eventually paid sums of money as recommended by the Labour Commissioner. The respondents were never satisfied with the quantum of the severance allowances paid to them. There were of the view that the severance allowance was wrongly calculated. However, there were no details regarding where the respondents would be repatriated to. The question of repatriation was eventually discussed at some forum. I will come back to the issue of repatriation later in this judgment. For now let me go on to deal with some event that occurred concerning the company.

Winding up of the company: Appointment of Liquidator

Before the additional benefits were given to the respondents, there was a development that has a bearing on this matter. On 2nd July 2002 the company was wound up pursuant to an order of the High Court.[5] Further, the Court appointed a liquidator (Mr Kelvin Carpenter).

Meeting on Repatriation Issue

As mentioned earlier, the respondents were not given details of their repatriation benefit. Indeed, the respondents did not know whether they were going to be repatriated to their respective places of recruitment or to their places of origin. It was during a meeting that the Receiver and Manager had with the respondents that the latter came to know that the repatriation was going to be to their places of recruitment. This is borne out from the Minutes[6] of the meeting that the Receiver and Manager had with the Union Representatives of the respondents.

The Respondents were not repatriated albeit that there was an intimation that they were to be repatriated to their respective places of recruitment.

The Industrial Relations Court Litigation

As mentioned above, the respondents were of the view that the severance allowances paid were inadequate. Further, the respondents were not in agreement with the arrangement regarding repatriation.

The respondents then, on 12th August 2002, resorted to instituting legal proceedings in the Industrial Relations Court. At the time of the commencement of proceedings the respondents were not legally represented. They later had legal representation.

In the proceedings that they instituted the respondents claimed the following relief:

(a) severance allowance

(b) interest on the said severance allowance

(c) repatriation

(d) legal collection charges

It is to be observed that in the amended statement of claim dated 10th February 2002 the respondent's lawyers did not give the statement of the material facts on which the respondents intended to rely on. This notwithstanding the court proceeded to hear the parties.

At the end of trial the court found for the respondents on all their claims. The Chairperson of the Industrial Relations Court handed down his judgment on 14th July 2003. In point of fact, the Chairman found that the respondents had been underpaid on severance pay. Regarding the issue of repatriation the court in quo wrote:

"On the issue of repatriation to their respective homes, the court finds that it is a requirement of fair practices as put in Section 31 of the Constitution, that upon termination of employment, the employee has to be repatriated to his/her place of abode.

This is more so where the termination has no blame worth on the part of the employee. As the court was told, most of those who were terminated of their services are just languishing in the cities or districts stations. Some, the court was told have been evicted from the houses by the New owners. This, I take is a catastrophic situation and it is a human rights abuse. Repatriating a former employee should not be looked at as a privilege on the part of the employee. It is a right in terms of fair labour practice. ---The Court orders that all those who are ready, able and willing to go back to their homes of origin(s), they should be immediately repatriated by being provided with hard cash so that they can make their transport arrangements on a personal level. The Registrar of the Industrial Relations Court to assess the costs on an individual basis. Those who are

willing to go to their places of recruitment also be assisted in the same manner---"[7]

As regards the claim for interest on the severance allowance the Chairman wrote: [8]

"As for the claim of interest on the late payment of dues the law is very clear under Section 53(1) [of the Employment Act, No. 6 of 2000] that such benefits are payable within six weeks. This is put in a mandatory way and there is no excuse about it. In the case of Encor Products,[9] Justice Chipeta made an order on interest in the following manner:

'(ii) that the defendant also do pay to the plaintiff interest at bank lending rate from 14th September 2002 on the outstanding amount, the day it was last due.'

Thus interest is indeed payable in these cases. In the instant case, after termination of employment, the applicants (Respondents) were supposed to be paid their benefits within six(6) weeks from the 13th of May 2002. But this was not followed. I therefore order that interest at the current bank lending rate should be levied on the delayed payments including the under payment"---

On the claim for legal collection charges the Chairman had this to say, at page 9 of his judgment:

"With regard to the issue of collection charges, this court already made a decision in the case of Mrs W.P. Zamaere vs. SUCOMA Limited[10]--- where I ordered that collection charges are payable and are not costs as envisaged in Section 72 of the Labour Relations Act.

I therefore order that the applicant's Counsel is entitled to his collection charges---"

The appellant was aggrieved by the decision of the Chairman. Accordingly, he appealed against the decision of the court in quo. The liquidator filed a Notice of Appeal[11] in the Industrial Relations Court in which be intimated that the respondent was appealing to this court against the whole decision of the Chairman.

The Appeal to this Court

However, the Memorandum of Appeal**[12]** that the Appellant filed with this court indicated that not all the findings of the Chairman were being challenged. Indeed, during the course of argument in this court Mr Njobvu, who appeared for the Appellant, indicated that the appeal was not going to be on the payment of severance allowance. He said the only findings of the Chairman that the Appellant was going to challenge were those holding that: The respondent's should be repatriated to their home of origin; that interest at bank lending rate should be paid on both the under paid and the delayed payment of severance allowance; and that the Respondent's Legal practitioner is entitled to collection charges.

There is no cross appeal on the part of the respondents. In the light of this, the only issues that have to be decided in this appeal are those that arise from the grounds of appeal set out in Memorandum of Appeal filed by the Appellants on 16th September 2003. Accordingly, the issues that require this court's consideration are as follows:-

(a) Whether or not, as a requirement of labour practices under Section 31(1) of the Republic of Malawi Constitution, the respondents are entitled to be repatriated to their home districts regardless of the circumstances an/or place of recruitment.

(b) Whether or not the court in quo had jurisdiction to award interest on any of the sums payable to the respondents following the termination of their employment with Import and Export (MW) Ltd (now in liquidation).

(c) Whether or not, if the respondents were entitled to interest, same was payable in the circumstances of this case.

(d) Whether or not the order that the Appellant should pay legal practitioner's collection charges was properly made.

The fact that the issues have been outlined seriatim does not mean that this court will decide these issues in the order as set out above. However, the court proposes to deal with this appeal in a such a manner that at the end of judgment there will be a determination on the questions of: repatriation, interest and legal collection charges.

At this juncture I will now turn to deal with the issues for consideration in this appeal. When doing so I will be alive to the fact that this court is only expected to deal with matters of law or jurisdiction[13]

CONSIDERATION OF THE ISSUES

Repatriation

The appellant submits that he is not obliged to repatriate the respondents to either their places of recruitment or to their places of origin. Mr Njobvu has contended in argument that this is the case since there is no provision in the contract of employment providing for such repatriation. It is the further view of the appellant that there is no obligation to repatriate the respondents because the Employment Act, 2000[14] does not provide for repatriation. This is unlike, so the contention goes, the situation that was obtaining under Section 16[15]of the repealed[16] Employment Act which obliged employers to repatriate employees.

The appellant has also made an alternative argument. In this regard it was contended that if at all the appellant is obliged to repatriate the respondents then such repatriation must be in respect of those employees who were brought to their respective places of employment by the company. The obligation, so the argument goes, would be to send the concerned respondents to their places of recruitment or their homes where the homes are nearer that their places of recruitment.

Mr Kankwasi, of Counsel for the respondents essentially submitted that the finding of the Chairman on the question of repatriation should be maintained. It is contended in argument, on behalf of the respondents, that by custom and conduct the company had been repatriating its employees to their places of origin. Thus, the contention goes, the appellant is obliged to repatriate the respondents to their homes and not to their places of recruitment.

As stated earlier, the Chairman found that it is a requirement of fair labour practices that an ex-employee has to be repatriated to his/her place of origin. In support of this finding the Chairman sought to rely on the provision of Section 31 of the Constitution. It must be said that this observation by the Chairman is erroneous. The said Section 31 does not provide that it is a requirement of fair labour practice that on termination of employment an employee should be repatriated to his home. Further, if this was an attempt to construe the stipulation in Section 31 of the Constitution then such construction or interpretation was, as shall soon be demonstrated, wrong. In any event, it is trite law that the Chairman has no jurisdiction to interpret the Constitution but only to apply the provisions of the Constitution.

What then does the Constitution mean by “fair labour practices” in Section 31? As was rightly pointed out by Justice Chipeta in **Guwende vs. Aon Malawi Limited**:[17]

“Whereas Section 31 of the Constitution is quite plain in its provision, inter alia, of the

right to fair labour practices, I must hasten to point out that that provision and even the Constitution in general does not quite help us to define or categorize what safe (fair) labour practices are---"[18] emphasis supplied

In order to determine the issue of what constitutes fair labour practices, it may be helpful to set out the relevant text of Section 31 of the Constitution.

Section 31(1) provides that:

"Every person shall have the right to fair and safe labour practices and to fair remuneration."

As already observed the Constitution has not defined what is meant by fair labour practices.[19] Further, it is noted that both the Labour Relations Act,[20] and the Employment Act, 2000 have not defined what constitutes fair labour practices. Indeed, there has been no decision of either the High Court or the Supreme Court on the point. In the light of this, the court will have recourse to what the courts within the region have said about this right to fair labour practices. The basis for this approach is our own Constitution.[21] In this regard, the court has in mind what the Constitutional Court of South Africa said in **National Education Health and Allied Workers Union vs. University of Capetown and Others**[22] whilst construing a provision similar to our Section 31(1) of the Republic of Malawi Constitution.[23] Whilst interpreting Section 23 of the Constitution of the Republic of South Africa,[24] the Constitutional Court of South Africa said the fairness that is required is towards both the employer and employee. This seems to me sound sense and I adopt it for the purpose of this judgment. Accordingly, it is the view of this court that the Chairman should have taken into account the interests of the company as well. It is advisable to remember that it was common cause between the parties, and the court in quo, that the employer of the respondents was in liquidation. In the judgment of this court it was not fair to order the liquidator to provide the employees with hard cash. Why order the payment of hard cash. The liquidator should have been given a choice on how it was to repatriate those willing to repatriate. Indeed, it was not being fair to require that the employees be repatriated to their home origin even where that would entail incurring more expenses on the part of a company that is in liquidation.

In the circumstances of this case, and in the light of what this court has said constitutes fair labour practices, fairness should have entailed repatriating the respondents to their respective places of recruitment or home origin, whichever is nearer. An order along those lines would be seen to take into consideration the fact that the company was in liquidation. Finally, it is a trite proposition of law that at the end of the contract of employment the employer is responsible for repatriation expenses of the employees to place of recruitment or to any other place which the two parties have agreed. In the

instant case the parties did not agree as regards the place they were to be repatriated. The appellant, in a meeting with respondent's reprehensive, only gave an indication of the amount that repatriation would cost.[25] There is accordingly no merit in the contention by Counsel that repatriation was to be on the alleged custom or practice of repatriating employees to their home origin. Indeed, the so called custom or conduct of repatriating employees to their respective places of origin must have had its basis on the statutory law as it stood then.[26] The statute, as already observed, has since been repealed. Upon its repeal the statutory provision, in Section 16 of the said repealed Employment Act, must be considered as if it had never existed.[27] Further, it is well to remember that it is not known if the so called practice or custom of repatriating employees to their home origin continued after the Employment Act, 2000 came into effect. Indeed, there is no finding of fact by the court in quo that such was the case.

In the light of the observations made above, the position should be that repatriation should be to the places of recruitment or home origin, whichever is nearer. This will be in keeping with what constitutes fair labour practice. It is so ordered.

The award of interest

As regards the issue of interest the court has noted that one of the relief sought by the respondent was interest on the severance allowance. Further, it is observed that this claim of interest only appears in the column for particulars of relief sought. Moreover, the respondents did not indicate that they were claiming the interest at any particular rate. This notwithstanding, the Chairman decided to award interest on the said severance allowance at the then current bank lending rate. Furthermore, the respondents did not plead, in the substantive part of its statement of claim form, the material facts and the basis upon which it was seeking interest on the severance allowance. This was contrary to the provisions of the Industrial Relations Court (Procedure) Rules 1999 which require a party to plead the material facts on which such party relies.[28]

The appellant has contended in argument that the court in quo had no jurisdiction to award the interest herein. It is the further contention of the appellant that interest ought not to have awarded as a matter of law. The respondents have a different view on this question of interest. It is argued on their behalf that the Industrial Relations Court had an equitable and/or inherent jurisdiction to award interest. Further, it was submitted by the appellant that the court in quo was entitled to award interest as a matter of law.

As I understand it, the position at law is that a claim for interest must be pleaded not only in the particulars of relief but also in the main body of statement of claim. The same applies with regard to the basis and the rate at which such interest is claimed.[29] The respondents statement of claim was not in compliance with this law. With due

respect, this court does not understand the basis on which the Chairman decided to award interest at the current-bank lending rate. The respondents never claimed interest at the rate at which it was awarded. The Chairman erred at law in departing from what the respondents were claiming in their claim form.[30]

Further, there is a settled proposition of law that an award of interest at a rate over and above the normal rule of interest awardable in a judgment is done when a court is exercising equitable jurisdiction.[31] Moreover, the position at law is that unless a claimant is seeking for no more than simple interest at a normal rate he should also put before the court evidence on which the court can decide what amount (if any) to allow: **Profinance Trust SA vs. Gladstone** [2002]1 BCLC 141 at 152; http://www.courtservice.gov.uk (last visited on 7th November 2003. There was no such evidence offered to justify the award of interest at more than the normal interest rate payable on a judgment debt. The Subordinate Courts in Malawi do not exercise equitable jurisdiction. As a matter of fact, the Industrial Relations Court, which is a subordinate court,[32] is not a court of equity. Surely, if it was such a court that had equitable jurisdiction it should have had jurisdiction to grant equitable remedies. Moreover, the jurisdiction of the Industrial Relations Court is clearly spelt out in the Constitution and the Labor Relations Act, 2000. It has jurisdiction to determine disputes brought to it under the Labour Relations Act or any other written law.[33] It is trite knowledge that equity is not written law. There is accordingly no equitable jurisdiction conferred on the Industrial Relations Court.

Consequently, it was wrong for a subordinate court to exercise equitable jurisdiction and award interest on that basis. This observation is made in the light of the contention that the Chairman was entitled to exercise equitable jurisdiction and that the court in quo made this award on equitable principle. Further, having regard to the fact that the claim for interest was not properly pleaded the respondent's claim for interest ought not have succeeded.[34] The interest that should have been awarded is the normal interest payable on a judgment debt and the rate is 5 per centum per annum as from the date of the decision by the Chairman.[35]

The long and short of it is that there ought not have been an award of interest on the said severance allowance at the said bank lending rate. The award of interest is therefore set aside. Instead, the normal rate of interest on a judgment debt shall apply.

Legal collection charges

As stated earlier, the respondents claimed legal collection charges. The court in quo awarded the respondents their prayer for legal collection charges. The court has

already noted the basis upon which the Chairman made the order of what it termed legal collection charges. The Chairman thinks that collection charges are not costs as envisaged in Section 72 of the Labour Relations Act. The said Section 72 of the Labour Relations Act provides that:

"(1) Subject to subsection (2), the Industrial Relations Court shall not make any order as to costs.

(2) The Industrial Relations Court may make an order as to costs where a party fails to attend, without good cause, any conciliation meeting under this Act, or where the matter is vexatious or frivolous."

This provision is very clear. It is, therefore, not necessary for the purpose of this judgment to express a view on what the said Section 72 mean.

As regards the proposition that collection charges are not costs this court would like to make an observation. It is not correct to say that collection charges are not costs and are therefore not taxable.[36] Accordingly, the Chairman's view that collection charges are payable in the Industrial Relations Court is erroneous. Indeed, the costs that are not payable in Section 72 of the Labour Relations Act include legal collection charges.

Finally, the court would like to point out a blatant error of law that the Chairman made when he ordered the payment of legal charges. The point I wish to make is that the order made had n o basis in law. Why does this court say so? This is said in view of the provisions of the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules. [37] My understanding of these rules, in particular table 6 of the First Schedule, is that with effect from 13th March 2002 legal collection charges are payable by the collecting party and not the paying party.[38] Consequently, even if were it be accepted that legal collection charges are not costs, the said legal collection charges ought to have been paid by the respondents and not the appellant. This is the case because the respondent's action was commenced, on 12th August 2002, well after the Legal Practitioners (Scale and Minimum Charges) (Amendment) Rules, 2002 came into force.

Further, it is my understanding of the recent amendment that where proceedings are commenced, legal practitioners may only charge solicitor and own client charges in addition to party and party costs. It is trite law that both solicitor and own client costs, and party and party costs, are taxable. Accordingly, it was idle talk on the part of the Chairman to say that the legal collection charges herein were payable because they are not taxable. In the light of the fact that these legal collection charges are taxable costs, it follows that the respondents are not entitled to party and party costs by virtue of Section

72 of the Labour Relations Act. As already seen, Section 72 precludes the Industrial Relations Court from making any order as to costs except as allowed by the said Section 72.

In the light of the observation made above, the Chairman erred in making an order for payment of legal collection charges by the appellant. The court in quo had no jurisdiction to make such an order. Actually, if the relevant law had been consulted the Chairman would have noted that such legal collection charges ought to have been paid by the respondents to their Legal Practitioner.

Conclusion

The appeal in respect of the order for interest and legal collection charges must be and is successful. As regards the issue of repatriation the appellant has failed to show that such an order was unlawful expect with regard the place of repatriation. The law, as demonstrated above, allows for repatriation and payment of repatriation expenses by an employer.

As regards the question of costs this court makes no order as to costs of this appeal. The court orders instead that the parties will pay their own costs. Actually, it is the view of this court that it would be an improper exercise of discretion to make an order of costs. I am of this opinion because such an order of costs would not have bee made by the court below.

Pronounced in open Court this 22nd day of December 2003 at Principal Registry, Blantyre.

F.E. Kapanda

JUDGE

[1] Being matter No. IRC 304 if 2002 commenced on 12th August 2002 where the respondent claimed the following relief:Severance allowance and interest thereonRepatriation(c) legal collection charges

[2] The company was wound up by the High Court on 2nd July 2002.

[3] The letter to each one of the former employees of the company was in the following terms: "13th May 2002 HEAD OFFICE**TERMINATION OF EMPLOYMENT**I regret to inform you that following my appointment as Receiver Manager on behalf of Commercial Bank of Malawi, all contracts of employment are to be terminated with effect from 15th May 2002 with one month notice in lieu of pay from that date. This means that you will be paid up to the 15th May 2002, together with one month pay in lieu of notice and also any accrued leave pay to that date. For practical reasons, this payment will take place on the usual payday, which is 27th May, 2002, to cover the following: (i) Salary up to 15th May 2002; (ii) One month's in lieu of notice; (iii) Accrued leave pay; As all employees are members of the pension fund, you will become entitled to your benefits under that fund following termination.The Administrator of the fund will be notified of the termination forthwith. You will be advised when the benefits under the fund are to be paid out. It falls to me to thank you for your services to the company and covey Best Wishes in your future employment.Yours sincerely,(Signed)R M Davies**RECEIVER MANAGER"**

[4] In the additional letter the respondents were informed that:"Our Ref RD/hs/P22/28 Your Ref Date 16/05/02"Union 2"To : All Members of StaffFrom: Receiver Manager Subject : ADDENDUM TO TERMINATION OF EMPLOYMENT LETTERFurther to the letter of termination of Employment dated 13th May 2002, the following additional items will be covered:- (a) Severance payment will be treated along with pension scheme payment in accordance with the provision of the FIRST SCHEDULE of the Employment Act as amended on 31st January 2002; Payment of pension will be expected within 6 weeks period; (b) Employees requiring repatriation will be assisted with transport as appropriate. Requests for transportation should be submitted to Personnel Department not later than 15th 2002; (c) Other matters as listed below will be considered in due course.Long Service Award for those entitled as at 15th May 2002; Refund of employees pension contributions made from individual salaries from the month of December 2001 to April 2002;Drivers Accident Free Bonus; Outstanding

overtime; Refund of Sacco loans deductions made from March 2002 salaries for those employees concerned; (singed)
(signed)V F SinjaniY Seleman HUMAN RESOURCES & ADMIN MANAGER UNION BRANCH CHAIRMAN(singed)Ray DaviesRECEIVER MANAGER

[5] Re: I and E Malawi Limited Miscellaneous Civil Cause No. 61 of 2002 (HC) unreported

[6] The Minutes of the meeting, held on 15th July 2002, are hereby reproduced: **MINUTES OF REPATRIATION WITH THE RECEIVER MANAGER ON 15TH JULY 2002 AT I&E MALAWI LIMITED HEAD OFFICE AT 2.00 PMPRESENT**R DAVIES- RECEIVER MANAGER S KAMPHASA H B NYIRENDAY SELEMANIE MBEZAL MINDANOG KANDOJE (MRS)J KANKHWANGWAROBERT MALAMBOF A NANYALO1. The meeting was officially opened by the Receiver Manager who welcomed everyone present and asked the Chairman of the I&E Trade Union to state the Agenda item.2.In response, the Union stated that amongst many, the issue at hand is repatriation which most employees of I&E Malawi Limited (under Receivership Manager) and consented to be repatriated.3.The Receiver Manager said that after the discussions of 16th May, 2002 (as contained in the addendum of the same date), his approach to the issue at hand was/is that he repatriate everyone to place of recruitment not place of origin (home). He further stated that something indicative as to the total cost of repatriation amounting to not less than K9,000,000.00 has been prepared. He also informed the meeting that a Liquidator has been appointed and any decision has to be done in consultation.4. The Union urged the Receiver Manager to further review his position that everybody must be repatriated to his/her home of origin - noting that the above approach of Receiver Manager in item (3) above does not make any huge economic change, emphasis was made on the hardships being experienced by all the employees affected when the Receiver Manager came in on 15th May 2002. The Union reminded the Receiver Manager that the Law (Employment Act 6, 2000) provides for quick refunds of Pension contributions and terminal benefits (Ref.: S53(1)(2) of the Employment Act.5. The Receiver Manager appreciated the Union's presentation on the hardships faced by ex employees of I&E under his authority but reconfirmed that he has to make decisions within the legal requirements and at that juncture to refer the issue to the Liquidator and was to come back to the Union within the week, latest by Friday 19th July 2002.6. The Receiver Manager was further reminded by the Union that his change of position on repatriation may have a bearing on the addendum issued on 16/05/02 and other issued contained therein, therefore, very important for his position in item (3) above be put in writing.7. The Receiver Manager agreed to make a write up to that effect after making appropriate consultation. SIGNED BY :_____ WITNESS :_____
RECEIVER MANAGER MR S KAMPHASA _____
WITNESS: _____

CHAIRPERSON I&E
UNION MR J
KANKHWANGWA
REPRESENTATIVE

[7] See Judgment of the Chairman at pages 7-8

[8] Ibid. at page 8

[9] L. Alufandika vs. Encor Products Ltd Civil Cause No. 3828 of 2000 (High Court decision of 23rd March 2001. The claimant in this case commenced proceedings by way of Originating Summons pursuant to Section 31 of the Constitution of the Republic of Malawi and Section 35 of the Employment Act (No. 6 of 2000). A perusal of the judgment of my learned brother Justice Chipeta does not show whether the plaintiff had claimed interest at the bank lending rate as ordered.

[10] Being matter No. IRC 157 of 2001

[11] The relevant parts of the Notice of Appeal were as follows: NOTICE OF APPEALTAKE NOTICE that the Respondent (now Appellant) being dissatisfied with the decision of the learned Chairperson for the Industrial Relations Court dated 14th July 2003 granting judgment in favour of the Applicant (now Appellant) do hereby appeal to the High Court of Malawi against the whole decision dated 24th day of July 2003 (Signed)Sidhu and Company---"

[12] The grounds of appeal set out in the Memorandum of Appeal are as follows: "MEMORANDUM OF APPEAL Grounds of Appeal1. The court erred in holding that the Appellant/Respondent was obliged under Section 31 of the Constitution of the Republic of Malawi upon termination of the Respondent's/Applicant's employment to repatriate all the Respondent's/Applicants to their home districts regardless of the circumstances of their recruitment.2.0 The court erred in awarding interest on the payments ordered to be made to the Respondents/Applicants: The court has no jurisdiction to award such interest or at all. (b) The court cannot order interest on any payments by or due from Import &Export (MW) Ltd (In Liquidation) which was wound up due to insolvency beyond the date of the order of winding up of the court i.e. 2nd July 2002. Further, such interest could not be ordered as a penalty for default in making payments of benefits to within 6 weeks as required under Section 53(1) of the Employment Act 2000 since the penalties for such default, if any, are those specifically provided for under Section 66 of the Act. (d) With regard to the question of delay, the Chairperson failed to consider the fact that in calculating the payments, which were made to the Applicants as severance allowance, the Appellant/Respondent were following advice from responsible Government authorities on the interpretation of the schedule to Section 35 of the Employment Act. Therefore, the imposition of interest on the addition payments necessitated by the differences in the Court's interpretation of the schedule to Section 53 from that of the Government authorities, as a penalty on the Appellant/Respondent, is misguided.In any case, there is no justification for awarding interest on the amounts payable as repatriation cost since the Appellant/Respondent is only obliged to meet the cost of repatriating the

Respondents/Applicants as repatriation costs.2.1 Further, the award of interest at the current bank lending rate is wrong in law and in principle since: The Applicants did not plead for interest at this rate in their Statement of Claim.(b) Such award is grossly excessive and unjustifiable.2. The court erred in ordering that the Respondents'/Applicant' lawyers are entitled to collection charges in this matter because such charges are not claimable by virtue of Section 72 of the Labour Relations Act or, at all. Dated this 15th day of September 2003. (Signed) SIDHU & COMPANY"

[13] Section 65(2) of the Labour Relations Act (No. 16 of 1996)

[14] Act No. 6 of 2000

[15] Section 16 of Employment Act (Cap 55:02) of the Laws of Malawi provided as follows: "(1) In the cases specified in subsection (2) every employee who has been brought to the place of employment by the employer or by a recruiter shall, if he was:engaged on a contract made in Malawi, be entitled to be sent back to the place of his engagement or his place of origin whichever;engaged on a contract made in another territory, be entitled to be sent back to the place of his engagement in that territory, and shall be provided with the facilities and expenses of and incidental thereto to the extent provided in subsection (4)(2) The facilities and expenses referred to in subsection (1) are referred to in this section as "repatriation provisions" and shall be provided in the following cases:(a) on the expiry of the period of service provided for in the contract; (b) on the termination of the contract by reason of the inability, refusal or neglect of the employer to comply with the provisions thereof;(c) on the termination of the contract by reason of the inability of the employee to comply with the provisions thereof due to illness or accident;(d) on the termination of the contract by agreement between the parties unless the agreement otherwise provides;(e) on rescission of the contract by a court, unless the court otherwise order.(3) When the family of an employee has been brought to the place of employment by the employer and the employee becomes entitled to repatriation provisions or dies, the family shall be entitled to repatriation provisions at the expense of the employer.(4) Repatriation provisions shall consist of the provision by the employer at the employer's expense of:suitable transport in accordance with section 17;subsistence expenses or rations during the journey;subsistence expenses or rations during the period, if any between the date of termination of the contract and the date of the start of the journey"Provided that the employer shall not be liable to provide subsistence expenses or rations in respect of any period during which -the employee's journey has been delayed by the employee's own fault or choice;the employer has provided employment for the employee at the rate of wages provided for in the expired contract.(5) Notwithstanding subsections (1), (2) and (3), an attesting officer or labour officer may exempt an employer from liability for all or any of the repatriation provisions in the following cases:(a) when such an officer is satisfied –(i) that the employee has signified that he does not wish to be repatriated; and(ii) that the employee has been settled elsewhere at his request or with his consent;(b) when such officer is satisfied that the employee, by his own choice, has failed to exercise his right to repatriation before the expiration of one month from the date of termination of the contract;(c) when the contract has been terminated otherwise than by reason of the inability of the employee to comply with the

provisions thereof owing to illness, accident or death and such allowance has been made for the payment of repatriation expenses by the employee and that suitable arrangements have been made by means of a system of deferred pay or otherwise to ensure that the employee has the funds necessary for the payment of such expenses.(6) Any person dissatisfied with the decision of an attesting officer or labour officer under subsection (5), may within fourteen of being informed of the decision appeal to the Minister, whose decision shall be final.(7) If any employer fails to comply with any of the provisions of this section the duty laid on him thereby shall be discharged by or under the directions of a labour officer and any reasonable expenses so incurred shall be a debt due by the employer to the Government. In any suit to recover such debt a certificate signed by a labour officer shall be conclusive evidence of the amount of the expenses so incurred.

[16] Section 68 of Act No. 6 of 2000

[17] Miscellaneous Civil Cause No. 25 of 2000 [High Court decision of 24th October 2000] unreported judgment of Chipeta, J.

[18] Ibid., p. 10

[19] Ibid.

[20] Act No. 16 of 1996

[21] Section 11(2)(c) of the Republic of Malawi Constitution states that: "In interpreting the provisions of this Constitution a court of law shall where applicable, have regard to current norms of public international law and comparable foreign case law" (emphasis supplied)

[22] [2002] (3) SA 1 (cc.)

[23] Section 23 of the Constitution of the Republic of South Africa, inter alia, provides that: "Everyone has the right to fair labour practices"

[24] Ibid.

[25] See footnote 6

[26] Section 16 of Employment Act (Cap 55:o2) of the Laws of Malawi

[27] Kay vs. Goodwin (1830)6 Bing. 576; 130 English Reports 1403 at 1405

[28] Rule 11(b)(ii) of the Industrial Relations Court (Procedure) Rules, 1999; see also Zomba Municipal Assembly vs. Council of the University of Malawi, Civil Cause No. 3567 of 2000 ureported (High Court)

[29] Zomba Municipal Assembly vs. Council of the University of Malawi C.C. No. 3567 of 2000

[30] Fred Nseula vs. Attorney General and Malawi Congress Party Civil Appeal No. 32 of 1997 (MSCA) at pages 5-6

[31] Wallersteiner vs. Moir (No.) [1975]1 All ER 849

[32] Section 110(2) of the Republic of Malawi Constitution

[33] Section 110(2) of the Constitution as read with Section 64 of the Labour Relations Act which provides that: "The Industrial Relations Court shall have original jurisdiction to hear and determine all labour disputes and all disputes assigned to it under this Act or any other written law

[34] Zomba Municipal Assembly vs. Council for the University of Malawi supra

[35] Section 65 of the Courts Act (Cap 3:02) of the Laws of Malawi.

[36] Preferential Trade Area Bank vs. Electricity Supply Commission of Malawi and Others C.c. No. 238 of 2000 (H.C.) unreported/http://www.judiciary.mw [last visited on 4th November 2003

[37] Government Notice No. of 2000 dated 13th March 2002

[38] Table 6 of the said First Schedule provides, inter alia: "Nature of Work Collection of moneys, solicitor and own client charge on collecting moneys to be charge on receipt of moneys: provided that where proceedings are commenced the percentage may only be charged on the amount up to the date commencement of such proceedings. Where proceedings are commenced solicitor may charge solicitor and own client charges in addition to party and party but, subject to any special agreement between solicitor and client on a percentage basis"